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No. 90-62

In The

Supreme Court of the United States

October Term, 1990

JOSEPH MANZO and PATRICK MANZO, et al.,

Petitioners,

vs.

MICHAEL MANZO, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIOARI TO THE SUPREME COURT OF NEW JERSEY

CHARLES J. IRWIN*
Member of the Bar of the Supreme Court of the United States
JOHN N. POST
IRWIN, POST, POLAK, GOODSELL & MANTELL
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 994-1100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

1. Whether improper conduct in 1981 by a trial judge, acting by agreement of the parties as an arbitrator in the implementation of a Settlement Stipulation entered into in 1976, constitutes a violation of due process which requires vacating all prior orders of that judge in that matter, where the party seeking such relief actively solicited the improper conduct and where that party has been unable to demonstrate any prejudice by that judge prior to his recusal.

LIST OF PARTIES

While petitioners correctly list the parties to the proceeding below, they incorrectly spell Clare Passarella's name. In addition, whereas Petitioners describe all of the corporations as closely held corporations owned by the Manzo brothers, as a result of the lower court's orders, Joseph and Patrick Manzo no longer have any interest in Manzo Contracting Co., Inc., Old Bridge Land Development Co., Inc., Northeastern Land Development Co., Inc., Marlboro Bar & Liquors, Inc., Manzo Excavating Company, Inc., and Madison Bituminous Products, Inc.

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JURISDICTION

This Court lacks or should not exercise its jurisdiction under 28 U.S.C. §1257(a) to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), or of the New Jersey Supreme Court in denying a request for certification and dismissing the appeal as of right, *see* Pet. 63a, because those decisions were based on adequate non-federal grounds. Those grounds include the fact that the final decisions of the eventual trial court judge, in his role as arbitrator by agreement of the parties, were non-appealable, and the fact that whatever objections Petitioners may have had based on alleged "prejudice" of Judge Yaccarino before he recused himself, were waived under applicable state law by Petitioners' failure to raise those objections in a timely manner. *See* Pet. 11a.

STATEMENT OF THE CASE

In 1976, petitioners, Patrick Manzo and Joseph Manzo, settled the law suit they had filed against their brother, Michael Manzo, involving seven family held corporations and business. That Settlement Stipulation recognized that certain further actions would be required to fully implement its terms. In recognition of the need to put an end to the disputes that had led to the litigation, the Stipulation provided that the Monmouth County Chancery Judge would serve as arbitrator in interpreting and implementing the terms of the Settlement, and expressly provided that the judge's decisions in that capacity would not be appealable. Pet. 4a-5a. Despite that

clear provision, Patrick and Joseph appealed numerous decisions of the Chancery Judge, only to be explicitly told by the Appellate Division on two separate occasions that the non-appealability provision of the Settlement Stipulation would be enforced. *See* Pet. 5a-6a.

For several years after the actual settlement, Judge Yaccarino, as the Chancery Judge, made various rulings interpreting and implementing the Settlement Stipulation. Those rulings included affirmation of the appraisals of numerous corporate assets and of the selection of assets made by Michael pursuant to the terms of the Settlement Stipulation. Apparently dissatisfied with the manner in which those rulings were being made, and having had Judge Yaccarino and the Appellate Division deny his request to set aside the entire Settlement Stipulation, Joseph Manzo in 1981 embarked on a course of improper dealings with Judge Yaccarino with the specific intent of having the Judge removed from the case. *See Matter of Yaccarino*, 101 N.J. 342, 378, 502 A.2d 3, 22 (1985). *See also Matter of Yaccarino*, 117 N.J. 175, 564 A.2d 1184 (1989) (disbarment). Those efforts succeeded, for in March 1982, Judge Yaccarino recused himself voluntarily from the case.

In May, 1982, Petitioners filed a motion "for relief to litigant" in which they sought eight forms of relief. One item of relief requested was an order "setting aside the Settlement Stipulation and order dated July 9, 1976 and requiring that the parties to this action negotiate a new agreement . . . " Pet. 7a. On May 13, 1982, apparently in connection with the motion, Patrick Manzo filed a certification which asserted that to avoid "impending tax disaster, the stipulation of settlement must be set

aside. . . . " Pet. 7a. That certification did *not* assert that a reason for setting aside the Settlement Stipulation was Judge Yaccarino's conduct, which by that time was well known to both Petitioners and the general public. *See Yaccarino*, 101 N.J. at 378, 383, 503 A.2d at 22, 24. That motion resulted in an order executed by Judge McGann, who succeeded Judge Yaccarino, reflecting that Petitioners' request to set aside the Settlement Stipulation had been voluntarily withdrawn. Pet. 7a.

Despite Joseph's knowing participation in the events which led to Judge Yaccarino's recusal and eventual removal from the bench, and despite not have raised the issue in the 1982 motion to vacate, in late 1986 Joseph shamelessly sought to benefit from his own improper behavior by moving to have all of Judge Yaccarino's decisions vacated, and to set aside the entire 1976 Settlement Stipulation. Judge McGann denied that motion. Pet. 8a 265. The Judge then appointed Irwin I. Kimmelman as Special Master pursuant to New Jersey Court Rule 4:41 to conduct hearings on the items remaining to implement the Settlement Stipulation. Pet. 8a.

Following the Special Master's hearings, Judge McGann entered a final Order implementing all provisions of the Settlement Stipulation, and Joseph and Patrick once again appealed.

Before the Appellate Division, Petitioners argued that Judge Yaccarino's misconduct in 1981 required setting aside the entire 1976 Settlement Stipulation. The Appellate Division disagreed.

In particular, the Appellate Division rejected Petitioners' contention that "because Judge Yaccarino

breached judicial ethics in connection with their settlement that breach is sufficient, standing alone, to set aside all his decisions in this matter." Pet. 9a. The court concluded that, particularly in the circumstances here, at least some indication of prejudice in the judicial actions taken *prior* to the misconduct must be found in the record in order to justify vacation of such prior actions. Rather than point to specific instances of prejudice, Petitioners asserted before the Appellate Division that they simply had a "pervasive feeling" that Judge Yaccarino was prejudiced against them and that "Michael might have somehow improperly influenced Judge Yaccarino." Pet. 11a. As the Appellate Division recognized,

> although plaintiffs' claim to have had the "pervasive feeling" of prejudice "throughout" the case, they never asserted that as a grounds for setting aside the settlement in either of their two prior appeals, nor did they raise the argument when they moved to set aside the settlement in May 1982, subsequent to Judge Yaccarino's refusal.
>
> [Pet. 11a.]

Against this record, the Appellate Division properly concluded that there was "a lack of substance in [Petitioners'] position on this point." Pet. 11a.

In addition, the Appellate Division quite properly concluded that Judge McGann's final order implementing the settlement was entered in his capacity as the arbitrator under the Settlement Stipulation. As such, his decisions were final and non-appealable unless entered without notice and without affording the parties an opportunity to be heard.

> However, in view of the extensive hearings conducted by the special master, the opportunity given to the parties to file exceptions to his report, and their opportunity to be heard in open court prior to the entry of Judge McGann's decision, it is clear that the due process aspects of the settlement document were faithfully followed.
>
> [Pet. 13a]

The New Jersey Supreme Court denied Petitioners' petition for certification, and dismissed Petitioners' appeal by Order dated February 26, 1990. Pet. 63a. That Court also denied Petitioner's motion for reconsideration by Order dated May 1, 1990.

Contrary to the Petitioners' characterization of the facts, Judge Yaccarino never "solicited a bribe," and nothing in the record of this case or of the New Jersey Supreme Court's decisions involving Judge Yaccarnio's misconduct supports that characterization. In fact, as previously indicated, one of the petitioners, Joseph Manzo, actively sought to induce Judge Yaccarino to act improperly for the purpose of getting the judge removed from the case.

REASONS FOR DENYING THE WRIT

1. THE FACT THAT THE LOWER COURT DECIDED THESE ISSUES ON ADEQUATE NON-FEDERAL GROUNDS REQUIRES THAT THIS COURT NOT EXERCISE ITS JURISDICTION.

In exercising its certiorari authority, this Court has repeatedly adhered to the principle that it will not review

judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1954). In the instant case, two such independent grounds exist. First, in addition to rejecting Petitioners' allegations of a due process violation, the Appellate Division concluded that Judge McGann's final order implementing the settlement was entered in his capacity as arbitrator under the Settlement Stipulation voluntarily entered into by the parties. As such, pursuant to the terms of that Stipulation, his decisions were final and non-appealable unless entered without notice and without affording the parties an opportunity to be heard. Pet. 13a. As that opportunity was clearly provided as to all of the decisions made by Judge McGann, the Appellate Division rested its decision on the adequate non-federal ground that the final order of Judge McGann was non-appealable.

In addition, the Appellate Division concluded that under applicable state law, Petitioners' long delay before asserting that prejudice occurred "throughout" the proceedings, constituted a waiver of such an objection. Specifically, they did not raise such an issue when they moved to set aside the Settlement in May 1982, subsequent to Judge Yaccarino's recusal. *See* Pet. 11a.

2. THE STATE COURT'S DECISION DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW, NOR DOES IT CONFLICT WITH THIS COURT'S DECISION IN *AETNA V. LAVOIE*.

In their argument, Petitioners fail to identify the "important question of federal law" raised by the decision below. Instead Petitioners' reason for granting the

writ is based upon the faulty premise that the record below indicates that Judge Yaccarino sought to solicit a "bribe" and that all of his decisions made *prior* to his improper conduct in 1981 were "suspicious" and "necessarily affected." Nothing in the record or in the two New Jersey Supreme Court decisions involving Judge Yaccarino supports these assertions.

While this case has consumed a substantial amount of judicial time over the past fourteen years, it has never involved issues of general public importance, let alone an important question of federal law. Rather, the case commenced as a shareholder dispute which was resolved by a detailed and complicated settlement stipulation in 1976. Over the next dozen years, the courts and Michael Manzo worked to implement that settlement. That process encountered repeated delays occasioned in large part by Joseph and Patrick appealing numerous decisions which they had agreed would be non-appealable, and by Joseph undertaking a series of actions designed to force Judge Yaccarino to disqualify himself from further involvement in the matter. *See Matter of Yaccarino*, 101 N.J. at 378, 502 A.2d at 22.

Having concluded that the Settlement Stipulation and the decisions implementing it were not to his liking, Joseph set out on a deliberate course to subvert justice by inducing Judge Yaccarino to commit actions requiring his disqualification. Having succeeded in getting rid of one judge whose decisions Joseph did not like, Joseph then urged Judge McGann and, most recently, the Appellate Division, that the entire settlement be set aside on the basis of his success in having compromised Judge Yaccarino.

Judge McGann properly denied the request, observing that to grant it would be "madness," Pet. 37a. The Appellate Division properly affirmed, finding a total lack of factual support for Petitioners' assertions of either general or specific prejudice. For Judge McGann or the Appellate Division to have granted Petitioners the relief they requested would have violated the long standing public policy in New Jersey that a party may not profit from his own wrong. *See, e.g., Jardine Estates v. Koppel*, 24 N.J. 536 541, 133 A.2d 1, 4 (1957).

The simple fact is that Joseph and Patrick Manzo are unhappy with the 1976 settlement and Joseph has been willing to go to any lengths, as evidenced by the Supreme Court decisions in *Yaccarino*, to have the settlement vacated. However, as the Appellate Division properly concluded, the Petitioners' displeasure with that settlement agreement did not provide a basis for setting it aside. Nor does that continuing displeasure provide a basis for this Court granting the writ.

Petitioners' assertion that the Appellate Division's decision in this case is inconsistent with the Court's opinion in *Aetna v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L.Ed. 2d 823 (1986) is also totally unpersuasive. While Rule 10.1(c) provides that a writ of certiorari may be granted "[w]hen a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court," the mere assertion of conflict with Supreme Court precedent will not suffice. "Rule [10] requires that the application of the precedent to the case at bar be clear, and that the state court . . . did not follow that precedent." 13 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶817.45 (2d Ed. 1988). Here, the

state court did acknowledge the precedent enunciated in the *Aetna* case. Pet. 9a. However, the Appellate Division properly concluded that *Aetna* was in no way dispositive of this case.

Aetna is inapplicable to the facts here and did not purport to address in general terms the effects of a *subsequently* arising disqualification on earlier actions of the disqualified judge. In *Aetna* this Court carefully limited its holding in these terms: "We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification." 106 S. Ct. at 1589.

The facts in *Aetna* were complex. Briefly stated, a sitting state supreme court justice casts the deciding vote in a matter that set direct and controlling precedent in two cases in which he was the plaintiff. Those two cases were pending in the lower courts of the same state. As a result of his vote and the supreme court's decision, that justice subsequently obtained a favorable settlement of $30,000 in one of his two actions. On these facts, this Court found that the state justice had a "direct, personal, substantial and pecuniary" interest in the outcome of the matter before the state supreme court at the time he participated in that court's decision. Under those circumstances, the Court concluded that the justice's participation had violated the litigant's due process rights. On those specific facts, the Court held that the justice should have disqualified himself and that his failure to have done so required vacating the state supreme court's decision. As the Court explained, because of the particular state justice's "leading role in the decision under review,

we conclude that the 'appearance of justice' will best be served by vacating the judgment." 106 S.Ct. at 1589.

What *Aetna* did *not* hold was that, in every case in which a judge should have disqualified himself, due process requires that all decisions made by that judge must be vacated or treated as "void." Moreover, this Court obviously did not address the question of what effect events which give rise at a specific point in time to a basis for disqualification have on decisions made by that judge at some time *prior* to those events.

The contrasts between this case and *Aetna* are clear. Firstly, the settlement in this case was a settlement, not a judicial decision by a judge who stood to benefit directly by that decision. It was reached with the full participation and with the understanding of all parties and their counsel as shown from the transcript which placed the settlement on the record. Secondly, the act of the judge which is cited as the basis for the request to vacate the Manzo settlement occurred, not while the settlement was pending, but in fact years after it had been agreed upon and substantially implemented. Indeed, the very property involved, the house in Sea Girt, had already been distributed to Joseph and Patrick.

Thus the facts amply support the conclusion that this decision reached by the Appellate Division in the case at bar is simply not inconsistent with *Aetna* or with any other decisions of this Court.

CONCLUSION

For the reasons set forth above, the requested writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. IRWIN*
Member of the Bar of the Supreme Court of the United States
JOHN N. POST
IRWIN, POST, POLAK, GOODSELL & MANTELL
Attorneys for Respondents

Dated: August 1, 1990